No. _____

In the Supreme Court of the United States
October Term, 1998

PERRY JOHNSON, et al,

Petitioners,

v.

EVERETT HADIX, et al,

Respondents.

PERRY JOHNSON, et al,

Petitioners,

v.

MARY GLOVER, et al,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the attorney fee provision of the Prison Litigation Reform Act, PLRA § 803, 42 USC § 1997e(d), applies to fees for services in litigation pending on the effective date of the PLRA.

PARTIES TO THE PROCEEDING

Johnson v. Hadix:

Petitioners, Kenneth L. McGinnis is Director of the MDOC; Dan Bolden is Deputy Director for the Bureau of Correctional Facilities; Denise Quarles is the Regional Administrator; Thomas G. Phillips; Bruce Curtis; Henry Grayson; and Barry McLeMore are Wardens at the SPSM facilities; Travis Jones; Harold White; David Jamrod; and Carmen Palmer are Deputy Wardens at the SPSM facilities. David Laurin; Fred Parker; Marilyn Ruben; and Mike Rankin are Business Managers. Marjorie VanOchten is Administrator for Office of Policy and Hearings.[1]

Respondents, Everett Hadix; Richard Mapes; Patrick C. Sommerville; Roosevelt Hudson, Jr.; Brent E. Koster; Lee A. McDonald; Darryl Sturges; Robert Flemster; William Lovett; James Covington; James Haddix; and several John Does, are persons who are or were confined in Michigan Department of Corrections.

Johnson v. Glover:

Petitioners, Kenneth McGinnis is Director of the MDOC; Griffin Rivers is Director of MDOC's Bureau of Programs; Dan Bolden is Director of MDOC's Bureau of Correctional Facilities; Lloyd Kimbrell is Director of MDOC's Bureau of Prison Industries; Robert Steinman is Director of the MDOC's Bureau of Field Services; Joan Yukins is Warden of the Scott

[1] These petitioners are the successors in office to Perry Johnson, Robert Brown, Graham Allen, Dale Foltz, Elton Scott, Pam Withrow, Frank Elo, John Jabe, Charles Utess and John Prelesnik, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. A number of these positions have been expanded from one person to four people as the prison has been divided and each has been assigned its own staff hierarchy. Marjorie VanOchten's previous title was Hearings Administrator.

Correctional Facility; Sally Langley is Warden of the Florence Crane Correctional Facility.[2]

Respondents, Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated are persons who are or were confined in the Michigan Department of Corrections.

[2] These petitioners are the successors in office of Perry Johnson, William Kime, Robert Brown, Jr., Frank Beetham, and Richard Nelson, respectively, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. Gloria Richardson, Dorothy Costen, and Clyde Graven, all listed as Defendants in the original action, are no longer Defendants due to the closure of certain facilities as women's prisons. Joan Yukins and Sally Langley were added as Defendants due to the opening of new facilities for women prisoners. Florence R. Crane, G. Robert Cotton, Thomas K. Eardley, Jr., B. James George, Jr., Duane L. Waters, and the Michigan Corrections Commission are no longer Defendants due to the dissolution of that Commission.

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Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 17, 1998.

OPINIONS BELOW

The April 17, 1998 opinion of the Court of Appeals is reported at 1998 U.S. App. LEXIS 7549 (6th Cir. April 17, 1998), and is reprinted in the Appendix to this Petition, App. 1a-26a. The prior opinions of the United States District Court for the Eastern District of Michigan, entered December 4, 1996, are not reported, and are reprinted in the Appendix to this Petition, App. 27a-41a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on April 17, 1998. On June 18, 1998, the Court of Appeals issued its Order denying Petitioners' Petition for Rehearing En Banc. App. 42a.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1, of the Constitution provides in relevant part that:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 802(b)(1) of the Prison Litigation Reform Act, 18 U.S.C. § 3626, provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with

respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

Section 803(d) of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), amending section 7 of the Civil Rights of Institutionalized Persons Act provides:

(d) ATTORNEY'S FEES.-(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that -

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the Defendant. If the award of attorney fees is not greater than 150 percent of the Judgment, the excess shall be paid by the Defendant.

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the

hourly rate established under section 3055A of Title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the Defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

STATEMENT OF THE CASE

This matter concerns attorney fees in prison reform litigation which has been pending before the district court for over twenty (20) years.

Glover involves a 21-year old controversy between incarcerated female felons and the Michigan Department of Corrections (hereafter MDOC). In 1977, Respondents, a class consisting of all female inmates incarcerated by the MDOC, filed a civil rights action pursuant to 42 U.S.C. § 1983 alleging that Petitioners, various officials of the MDOC, violated the Equal Protection Clause of the United States Constitution with regard to programming and access to the courts.

Hadix concerns a 13-year old Consent Decree (18 years of litigation) involving a class of male prisoners incarcerated at the State Prison of Southern Michigan, Central Complex, who pursuant to 42 U.S.C. § 1983 alleged violations of the First, Eighth, Ninth and Fourteenth Amendments to the Constitution.

In 1985 in *Glover*, and 1987 in *Hadix*, the district court entered orders which awarded fees and costs to Respondents' attorneys for compliance monitoring. Pursuant to procedures established by the district court in each case, a system was created which provided for Respondents' submission of fees and costs on a semi-annual basis and for the lodging of Petitioners' objections. In the absence of agreement, the district court resolves the fee dispute.

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), (PLRA), was signed into law by President Clinton and took effect on April 26, 1996.[3] The PLRA was intended to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees such as those involved in

[3] The PLRA is found in Title VIII of the omnibus appropriation bill for the fiscal year 1996 for the Departments of Commerce, Justice and State, the Judiciary and Related Agencies.

Glover and *Hadix*.[4] A second purpose of the PLRA was to stem the tide of frivolous prisoner suits.[5] Section 803(d) of the PLRA includes the provision governing the award of attorney fees in prisoner civil rights litigation. It provides in relevant part:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that --
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d)(3). In the United States District Court for the Eastern District of Michigan, $75.00 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1). The

[4] *See, e.g.*, 141 Cong. Rec. S14315 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) ("The legislation I am introducing today [S. 1275] will return sanity and State control to our prison systems by limiting judicial remedies in prison cases [such as those in the State of Michigan] . . . ."); 141 Cong. Rec S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) ("these guidelines will work to restrain liberal federal judges who see violations on [sic] constitutional rights in every prisoner complaint who have used these complaints to micromanage state and local prisons.").

[5] *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners).

established rate of pay for Respondents' attorneys in both cases has been $150.00 per hour since at least 1993. The PLRA cap on attorney fees would reduce this amount to $112.50 per hour.

After the enactment of the PLRA, each class of Respondents in *Glover* and *Hadix* filed a petition for services performed from January 1, 1996 through June 30, 1996 pursuant to established procedure. Petitioners argued that the attorney fee limitation of the PLRA should be applied to the fee petitions. In nearly identical opinions, the district court held the fee provision inapplicable to fees earned for services performed before enactment of the PLRA but applied it to those earned for services performed thereafter. (App., pp 27a-41a).

On April 17, 1998, the Court of Appeals issued its Opinion affirming the District Court's decision that held the fee provision inapplicable to fees earned before the enactment of the PLRA and reversing the District Court's decision applying the PLRA to fees earned after the Act's enactment. (App., pp 1a-26a). Subsequently, on June 18, 1998, the Sixth Circuit issued its Order denying Petitioners' Petition for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's Opinion conflicts with the other circuits that have reviewed this issue. The Fourth, Eighth and Ninth Circuit Courts of Appeal have held that the PLRA's attorney fee provisions apply to legal fees earned in actions pending on the date of enactment. *Alexander S. v Boyd*, 113 F.3d 1373 (4th Cir. 1997) *cert den* 139 L.Ed.2d 869 (1998); *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997); *Madrid v. Gomez*, _ F.3d _; 1998 U.S. App. Lexis 14857 (9th Cir. July 2, 1998).

In addition, the Court of Appeals has misapprehended decisions of this Court and the intent of Congress on an important federal question being litigated throughout the country. The PLRA is comprised of ten sections; the attorney fee provisions are contained in § 803 which is codified at 42 U.S.C. § 1997e(d). The Court of Appeals failed to give effect

to the plain language of § 803 which is applicable to all litigation brought by prisoners, no matter when begun. Only § 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions. The Court of Appeals erred by concluding that Congress's inclusion of a provision applying a different part of the Act (section 802) to pending cases, combined with the absence of any provision prescribing the fee provisions' reach, implies that Congress intended the fee provisions to apply only to cases filed after the Act's passage.

In the absence of conclusive evidence of congressional intent the inquiry turns to whether the provision, if retrospectively applied, would have an impermissible retroactive effect. In the instant case, applying the fee provisions of the PLRA to attorney hours worked after the PLRA's passage would have no retroactive effect. All the disputed compensable legal work at issue was performed after the enactment of the PLRA and, so, should be governed by the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place", *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). Under that principle, the conduct -- the work performed by the lawyers -- should be assessed under the law -- the PLRA -- in effect at the time the fees were earned.

Unless this Court grants certiorari and reverses the erroneous decision of the Court of Appeals, Michigan taxpayers will be required to pay hundreds of thousands of dollars in attorney fees under the PLRA, 42 U.S.C. § 1997e(d), contrary to the clear prohibition of the act.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL CONCERNING THE APPLICATION OF PLRA § 803 TO ATTORNEY FEES EARNED FOR SERVICES PERFORMED IN LITIGATION PENDING ON THE DATE OF ITS ENACTMENT.

Four circuit courts of appeal have addressed the issue of whether the PLRA applies to attorney fees payable for services performed after enactment of the PLRA. The Fourth, Eighth and Ninth Circuit Courts of Appeals have held that the PLRA's attorney fee provisions apply to legal fees earned in actions pending on the date of enactment. The Sixth Circuit alone has held to the contrary. This Court has repeatedly held that certiorari review is appropriate where there is a conflict between the general principles or reasoning adopted in the several courts of appeals. Supreme Court Rule 10(a); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985); *Oregon Dep't of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975).

In *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997), the Court held that § 803(d) applies to all hours worked in prisoner litigation after the effective date of the PLRA. The Court distinguished its earlier decision in *Jensen v. Clark*, 94 F.3d 1191 (8th Cir. 1996), by noting that the legal work there had been performed (and the award issued) before the PLRA had taken effect. *Id.* at 1094.

In *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997) *cert den* 139 L.Ed.2d 869 (1998), the Court took a broader view, reading what it called the "plain language" of § 803(d) as mandating that attorney fees awarded after April 26, 1996, comply with its restrictions regardless of when the work was performed. *Id.* at 1386. While Congress could have used limiting language, it had not done so; accordingly the "*plain language* of § 803(d) of the PLRA . . . mandates that the attorney fee limitations apply to awards [made after the Act]." *Id.* (emphasis added). The concurring judge agreed

that the "plain language of the statute directs that it applies when a court makes its *award* . . . ." *Id.* at 1392 (emphasis in original). In *Alexander S.*, the Court also focused on the "secondary" nature of attorney fees and held the PLRA's attorney fees provisions did not disrupt any matured rights of the parties. *Id.* at 1387-88. The Court determined "a statute has a retroactive effect under *Landgraf* only when it negatively impacts a party's expectations or rights." *Id.* at 1387 n. 12. The PLRA fee provisions only "upset the expectations of Plaintiff's counsel," but that was not enough to create an impermissible retroactive effect. *Id.* The Court further determined the PLRA fee provision did not "attach new legal consequences to completed events," nor were the provisions "so fundamentally unfair as to result in manifest injustice." *Id.* at 1388.[6]

In *Madrid v. Gomez*, __ F.3d __; 1998 U.S. App. Lexis 14857 (9th Cir. July 2, 1998), the Court held that the attorney fee limitations provisions of the PLRA apply to cases which were pending at the time of the Act's enactment. The Court held that the clear language of section 803 compels application of the attorney fee provisions to such cases. *Id.* at *7-17. The Court also noted that, even were this "express command omitted from the statute", the PLRA does not have a "retroactive effect" if applied to cases pending at its enactment. *Id.* at *17-18.

In the instant case, *Hadix v. Johnson*, Nos. 96-2567; 2568; 2586; 2588, 1998 U.S. App. LEXIS 7549 (6th Cir. April 17, 1998), the Sixth Circuit nevertheless held that § 803(d) is "retroactive" if applied in litigation commenced before the PLRA was enacted, no matter how much later the lawyers do their work. The Court of Appeals has expanded the concept of "retroactivity" beyond recognition, but even if its premise is correct, the conclusion that § 803(d) should never be applied to litigation pending when the PLRA took effect is wrong.

Because of the inconsistencies described above and

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6 The Court also held the PLRA provisions had to be applied to all legal work in pending cases performed prior to the date of enactment where the award of attorney fees is made after April 26, 1996. *Id.* at 1377.

because of the national importance of the effects of the attorneys fee provisions of the PLRA on prisoner litigation, this Court should grant certiorari in this case.

II.

THE PRISON LITIGATION REFORM ACT APPLIES TO ATTORNEY FEES EARNED FOR SERVICES PERFORMED IN LITIGATION PENDING ON THE DATE OF ITS ENACTMENT.

A. The Plain Language of PLRA § 803 Makes It Applicable to All Litigation Brought by Prisoners, No Matter When Begun.

The plain language of PLRA § 803(d), 42 U.S.C. § 1997e(d) makes it applicable to all litigation brought by prisoners, no matter when begun. The attorney fee provisions unmistakably apply to "any action brought by a prisoner who is confined to any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(d)(1). In any action, attorney fees "shall not be awarded" unless directly and measurably incurred in proving an actual violation; in any action, "no award of attorney fees" shall exceed the prescribed hourly rate. 42 U.S.C. § 1997e(d)(1), (3). Thus, regardless of when the case was filed, section 803 applies; the statute by its terms, targets any post-enactment award. The text is simply not susceptible to another meaning. *See, Madrid v. Gomez*, __ F.3d __; 1998 U.S. App. Lexis 14857, *9 (9th Cir. July 2, 1998). The "in an action brought by a prisoner" language uses no words of temporal restriction, plain or obscure. Rather, the language is descriptive of the type of litigation to be affected: "any action brought by a prisoner." On its face, it is also comprehensive, embracing *all* such actions, irrespective of when they were filed.

The only way to foster an alternative meaning would be to add language to what Congress has written. The attorney fee provisions operate in "any action," not in "any action filed after the effective date." *Id.* A court should not alter a statute's effect by reading into the text words which Congress chose to omit. Nor should a court disregard the plain meaning

of the word "any." In its conventional usage, "any" means "ALL - used to indicate a maximum or whole." *Webster's Ninth Collegiate Dictionary*, 93 (1st ed. 1986).

"By expressly stating that [§ 803] applies to an 'award' of fees Congress clearly evidenced its intent to affect a fee 'award' regardless of when legal work was completed." *Alexander S. v. Boyd*, 113 F.3d 1373, 1393 (1997), *cert. den.* 139 L. Ed. 2d 869 (1998) (Motz, J. concurring). Even the Court of Appeals recognized that the applicability of the statute cannot turn on the timing of the work. *See* App., p 11a. ("We do not believe the statutory language is capable of such a sophisticated construction.") Moreover, § 803 emphatically states: "*No* award of attorney's fees . . . shall be based on an hourly rate greater than [$112.50]." 42 U.S.C. § 1997e(d)(3) (emphasis added). There can be only one interpretation of this word: "No" means "no." *See, Madrid* at *10-11.

In *Lindh v. Murphy*, 521 U.S. ___; 117 S. Ct. 2059; 138 L. Ed. 2d 481 (1997), this Court acknowledged the force of categorical language such as "all" and "any." *Lindh*, 117 S. Ct. at 2064, n. 4. Stressing the word "all" -- and noting its "absolute" nature -- this Court quoted the unenacted precursor to the statute addressed in *Landgraf* as an example of language that might qualify as a clear statement: "[This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act." *Id.* This Court also cited by way of analogy, the unequivocal waiver of sovereign immunity at issue in *United States v. Williams*, 514 U.S. 527, 531-32 (1995), and emphasized the absolute nature of the word "any" used in granting jurisdiction to the courts over "'*any* civil action against the United States for the recovery of *any* internal-revenue tax alleged to have been *erroneously* or illegally assessed or *collected*'." *Lindh*, 117 S. Ct. at 2064, n.4 (emphasis in *Williams*, underlined emphasis added). Section 803 also uses the word "any."

As recently noted by the Ninth Circuit Court of Appeals in determining that the attorney fee limitations provisions of the PLRA apply to cases which are pending at the time of its enactment:

> We acknowledge that Congress could have been

even more precise than it was. For example, it could have added a sentence at the end of § 803 reciting that the attorney's fee provisions "apply both to cases pending on and to cases commenced after the enactment date." However, the Supreme Court has never required the most emphatic possible articulation of a statement, only an unambiguous directive. Indeed, in Landgraf, as Justice Scalia noted with dismay, the Court was even willing to look to legislative history to find a clear statement. See *Landgraf, 511 U.S. at 287* (Scalia, J., concurring)(citing *Landgraf, 511 U.S. at 257-63)*; see also *Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184, 1 L. Ed. 2d 746, 77 S. Ct. 707 (1957)* ("It is clear from the language of the section and its legislative history that Congress thereby confirmed the authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively . . . .")(emphasis added). We therefore conclude that Congress's use of the word "any" unambiguously indicates that the PLRA's attorney's fee provisions apply to all actions, irrespective of when they were filed.

Madrid at *12-13 (footnotes omitted).

B. Comparison of PLRA § 802 with PLRA § 803 Does Not Permit the Negative Inference That Congress Intended § 803 to Apply Only to Cases Filed After the Enactment of the PLRA.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court prescribed the analysis a court should use to determine whether a federal statute should be applied retrospectively. First, if there is evidence of congressional intent, then that intent is followed. *Id.* at 264, 280; see also *Lindh v. Murphy*, 521 U.S. __; 117 S. Ct. 2059; 138 L. Ed. 2d 481 (1997) (seeking to determine, in first step of *Landgraf* analysis, what "a thoughtful member of the Congress was most likely to have intended"). Where there is no conclusive evidence of congressional intent, the inquiry turns to whether the provision, if retrospectively applied, would have an

impermissible "retroactive effect." *Landgraf* at 280. If it has such an effect, then the general presumption against retrospective application applies, and the statute is applied only prospectively. *Id.* Conversely, if the statute has no retroactive effect, then the general presumption falls away, and a court should "apply the law in effect at the time it renders its decision." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) (quoted in *Landgraf*, 511 U.S. at 264).

Despite the statutory language applying § 803 to "any" action, both the text of the PLRA and the Act's legislative history are silent on the specific question of whether the fee provisions apply to cases pending on the date of the Act's passage. Under *Landgraf*, this ends the first step of the analysis. Despite this silence, the Court of Appeals improperly concluded that Congress's intent not to apply the fee provisions is plain from the language of the PLRA. The PLRA is comprised of ten sections; the attorney fee provisions, codified at 42 U.S.C. § 1997e(d), are contained in section 803. Only section 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions.[7] According to the Court of Appeals' Opinion, the fact that Congress expressly applied section 802 to pending cases and did not expressly do so in the attorney fee provisions of section 803 leads to the inference that Congress intended the fee provisions to apply only to cases filed after the Act's passage. Petitioners contend the Court of Appeals reads too much into Congress's silence, however.

Contrary to the Court of Appeals' decision, Congress's prescription of the temporal reach of section 802 of the PLRA has no implications for the Act's attorney fee provisions. Where, as here, two provisions have distinctly different effects, the presence of an express temporal limit in one has little bearing on the absence of an express limit in the other. *See Lindh v. Murphy, supra*. In *Lindh*, this Court was presented

[7] Section 802(b)(1) of the PLRA provides: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."

with the question whether the Antiterrorism and Effective Death Penalty Act's (AEDPA) amendments to chapter 153 of Title 28 applied to cases pending at enactment. As here, Congress was silent as to the amendments' temporal reach. However, Congress explicitly provided that the AEDPA's amendments to chapter 154 of Title 28 "shall apply to cases pending on or after the date of enactment of the Act." Pub. L. No. 104-132, § 107(c), 110 Stat. 1214 (Apr. 24 1996).

In determining what implications to draw from Congress's different treatment of the two sets of amendments, this Court compared the effects of the two provisions. The amendments to chapter 153 created new standards for the review of habeas corpus petitions filed by state prisoners; likewise, the amendments to chapter 154 created new standards for the review of habeas corpus petitions filed by state prisoners under capital sentences. *Lindh*, 117 S. Ct. at 2063-64. The fact that both provisions "govern standards affecting entitlement to relief" was "significant" to this Court. *Id.* at 2064. In part because of this similarity, this Court concluded that Congress's silence with regard to the temporal reach of the chapter 153 amendments could be read as signaling its intent that the amendments not be applied to pending cases. *Id.* at 2064-65.

Both AEDPA chapters considered in *Lindh* established the standard for review for habeas corpus petitions filed by state prisoners. No such similarity exists between sections 802 and 803 of the PLRA. Section 802 of the PLRA creates new standards for awards of prospective relief in litigation over prison conditions. It prohibits the award of prospective relief unless the relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." Section 802(a), 18 U.S.C. § 3626(a)(1). Moreover, it provides for "immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court" that the new conditions just described were met. Section 802(a), 18 U.S.C. § 3626(B)(2) ("immediate termination provision"). At the time of the Act's passage, numerous awards of prospective relief already existed, over which many federal judges across the country retained continuing jurisdiction. In light of those existing

orders, it is unsurprising that Congress took an affirmative step to make its intentions -- that the new substantive provisions would in fact apply to those orders -- absolutely clear. *See, e.g., Salahuddin v. Mead*, 1997 U.S. Dist. LEXIS 8895 (S.D.N.Y. June 26, 1997) ("a plain reading of section 802 shows that Congress inserted such specific retroactive language in order to emphasize the unusually far-reaching consequences of this retroactivity provision.")

By contrast, the provisions at issue here -- located in section 803 of the Act -- merely govern the award of attorney fees. The provisions have no effect on judgments or awards already entered. These provisions thus have nothing in common with section 802 of the Act. Congress's decision to affirmatively prescribe the temporal reach of section 802, therefore, has no bearing on Congress's silence on the reach of the fees provisions. *See Id.* The failure of Congress to include language in section 803 specifically dealing with pending cases is not a case where "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n. 23 (1991); see also *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1989) (Rehnquist, J., dissenting).

The Court of Appeals reviewed a part of the legislative history, and conceded that the negative inference to be drawn from the Senate's decision to include the attorneys' fees provision in § 803 rather than in § 802 "is weaker than the inference drawn in *Lindh*." (App., p 16a). Despite this concession, the Court said: "Nonetheless, the identical negative inference that was drawn in *Lindh* can be drawn when sections 802 and 803 are compared." *Id.* Section 802, the Court wrote, was addressed to restrain perceived judicial excesses in prison litigation, past and future. By contrast, § 803 is "forward looking," "aimed at the filing of frivolous lawsuits." (App., p 16a).

The Court of Appeals' analysis is flawed for a number of reasons. First, *Lindh* found a negative inference to be justified only when two parts of a statute are so closely related that the strong implication is that, in choosing different language, Congress drew a "deliberate * * * contrast" between them. *Lindh*, 117 S. Ct. at 2065. Where statutory provisions are less closely related, the negative pregnant inference is far weaker,

especially when other textual pointers suggest a different result. *See Field v. Mans*, 516 U.S. 59, 67-68, 75 (1995). In *Lindh*, chapters 153 and 154 were complementary halves of the entire habeas corpus portion of Title 28. Similarly, *Field* compared two paragraphs of a Bankruptcy Code subsection. By contrast, sections 802 and 803 amend disparate laws in Titles 18 and 42.

More importantly, the subject-matters of sections 802 and 803 are wholly distinct. Section 802 sets substantive limits on prison reform litigation. Under *Landgraf*, an express direction by Congress was necessary to limit previously issued injunctions.[8] Without the language in section 802, courts would be under no obligation to amend those injunctions or bring them to an end. *Collins v. Algarin*, 1998 U.S. Dist. LEXIS 83 at *10-*11 (E.D. Pa. 1998); *Salahuddin v. Mead*, 1997 U.S. Dist. Lexis 8895 at *10 (S.D. N.Y. 1997)(language was used "to emphasize the unusually far-reaching consequences of this retroactivity provision"). The absence of similar language in section 803 of the PLRA is easily explained because there is no similarly compelling reason to specify that the law will apply to conduct -- such as work to be done by lawyers in the future --which would occur only after the Act's effective date. *Collins*, at *11.

Second, *Lindh* found it critical -- even dispositive -- that chapters 153 and 154 both fell on the substantive side of the *Landgraf* default rule. *Lindh*, 117 S. Ct. at 2063-2064. That permitted this Court to conclude that Congress, legislating with presumed knowledge of *Landgraf's* "predictable background rule" (*Landgraf*, 511 U.S. at 273), had deliberately chosen to treat chapters 153 and 154 disparately. The *Lindh* analysis yields an entirely different result here. Section 802, designed to reopen existing injunctions, reaches the merits of the litigation and is plainly substantive. By contrast, section 803(d) in the present context, deals only with attorney fees and is considered procedural and collateral. *Landgraf*, 511 U.S. at 277. In light of Congress's presumed familiarity with

[8] *See, e.g.*, 18 U.S.C. § 3626(b)(2), as amended by PLRA § 802(a), which permits the immediate termination of prospective relief if the relief had been approved or granted without a finding now required by the PLRA.

Landgraf, *Lindh* compels the conclusion that Congress intended both sections to apply to pending litigation despite differences in language. Under *Landgraf* and *Lindh*, section 802 is retroactive only because Congress explicitly said so; section 803(d) is "retroactive" because Congress knew it to be procedural.

Third, the Court of Appeals misunderstood the purpose of the PLRA's attorney fee provisions and therefore mistakenly assumed that they could only be "forward looking." (App., p 16a). The purpose of the fee provisions was plainly *not* to curtail frivolous lawsuits, as the Sixth Circuit supposed. Fees are never awarded unless the plaintiff is the prevailing party. By definition, if the plaintiff is entitled to fees, it is because the litigation was *not* frivolous. The more likely explanation for § 1997e(d) is that Congress wanted to protect states and local government treasuries from the enormous costs of *successful* litigation. Without restrictions, fee-shifting substantially increases the financial burden of prison litigation, sometimes exceeding the other costs of court-ordered relief. That is especially so when monitoring by counsel extends over decades, as in these cases. The authors of the PLRA expressed great concern about the cost of prison litigation to state and local governments. When introducing S. 1279, Senator Dole expressed dismay that prison litigation cost the states $81 million annually. 141 CONG. REC. S14413 (daily ed., Sept. 27, 1995). Senator Hatch, noting that 45% of all federal civil cases in Arizona in 1994 had been filed by prisoners, declared that "it is time to wrest control of our prisons from the lawyers and the inmates * * *." *Id.* at 14418. In the House, the committee report noted that costs to state and local governments would be reduced by a more proportional system for awarding fees and by eliminating financial incentives to litigate such ancillary matters as, notably, fee petitions. H.R. Rept. 104-21, "Violent Criminal Incarceration Act of 1995" at 28 (Feb. 6, 1995). Congress's concern about this financial hemorrhaging is not inherently "forward looking," as the lower court falsely assumed. Congress was fully aware that prison litigation often had untold longevity. *See Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995) (monitoring of prison-reform decree "resembles a cash cow"). It is far more likely, therefore, that Congress intended the attorney fee provisions to apply to pending

litigation, especially for work performed after the PLRA's effective date, in order to give states and local governments immediate relief from the future long-term, expenses of existing litigation.

Petitioners submit that the Court of Appeals erred in drawing any negative inferences from the express inclusion of a provision making section 802 applicable to pending cases and the absence of the same from section 803. *Landgraf*, 511 U.S. at 259-61 (rejecting argument that "because Congress provided specifically for prospectivity in two places . . . we should infer that it intended the opposite for the remainder of the statute").

C. Applying the Attorney Fee Provisions to Work Performed in Pending Litigation After the PLRA's Enactment Will Have No Retroactive Effect.

A new statute would have a retroactive effect if, when applied to pending cases, it would impose new burdens on a party who relied on the prior legislative scheme. *Landgraf*, 511 U.S. at 265 (the presumption against retroactive legislation is grounded in "[e]lementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and *to conform their conduct accordingly*.") (emphasis added); *see also Id.* at 270 ("familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining whether a statute would have a retroactive effect). Thus, a statute would have a retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Here, applying the attorney fee provisions only to legal work performed after the PLRA's passage would have no retroactive effect.

There is an impermissible retroactive effect if application of the statute to a pending action amounts to an "injustice." *Bradley*, 416 U.S. at 717; see *Lindh*, 117 S. Ct. at 2063 (intervening statute changed "standards of proof and persuasion in a way favorable to [the] state"). If the new

statute causes a "change in the substantive obligation of the parties," application of the statute may be impermissible. *Bradley*, 416 U.S. at 721. New statutes cannot be applied to pending actions if they would "infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 270.

A statute is retroactive only when it "attaches new legal consequences to *events completed before its enactment*." *Landgraf*, 511 U.S. at 269 (emphasis added). *Landgraf's* definition of retroactivity echoes the precedent this Court cited there, *Id.* at 269, n. 23; *Miller v. Florida*, 482 U.S. 423, 430 (1987)("changes the legal consequences of acts *completed before its effective date*")(internal quotations omitted; emphasis added); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)("gives quality or effect to acts or conduct which they did not have or did not contemplate *when they were performed*")(emphasis added). *Landgraf* itself deals with a typical retroactivity problem, that of increasing a defendant's costs for pre-act conduct by creating rights to compensatory and punitive damages. Punitive damages come close to criminalizing past conduct and compensatory damages are so "quintessentially backward-looking" that they constitute a new cause of action. *Landgraf*, 511 U.S. at 281, 283. *See*, similarly, *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 303 (1994)(statute enlarging categories of conduct subject to liability will not be applied to events occurring before enactment); *Hughes Aircraft Co. v. United States ex rel. Schumer*, __ U.S. __, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997)(statute eliminating a defense to *qui tam* suits will not be applied to past fraudulent actions).

The bias against retroactive legislation arises precisely because of its impact on completed conduct, conduct that can no longer be altered. "Retroactivity" is disfavored because a new law "would impair rights a party possessed *when he acted*, increase a party's liability *for past conduct*, or impose new duties with respect to *transactions already completed*." *Id.* at 280; emphasis added. There is an obvious "unfairness [in] imposing new burdens on persons after the fact." *Landgraf*, 511 U.S. at 270; *Id.* at 282 n. 35 (noting that unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past). Fairness dictates that

people "should have an opportunity to know what the law is and to conform their conduct accordingly" before they act. *Id.* at 265.

There is no corresponding unfairness, of course, when legislation regulates future conduct -- conduct that takes place *after* the legislation is in place: "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central RR Co. v. White*, 243 U.S. 188, 198 (1917); *see Landgraf*, 511 at 269, n. 24, quoting L. Fuller, THE MORALITY OF LAW 60 (1964)("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever").

Under *Landgraf*, application of the PLRA to services performed after enactment would not be retroactive, even in cases filed prior to the enactment date. To the contrary, this Court in *Landgraf* relied in part on its prior holding in *Bradley*, in which a new attorney fee provision was applied despite the fact that the provision was enacted while the case was on appeal. In explaining the *Bradley* decision, this Court in *Landgraf* suggested that the traditional presumption against retroactive application of new statutes might apply differently when the new provisions regulate attorney fees, because "[a]ttorney fees determinations . . . are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." 511 U.S. at 277 (quoting *White v. New Hampshire Dept of Employment Security*, 455 U.S. 445, 451-52 (1982)).

When an intervening statute affects prospective relief, it is neither retroactive nor unfair. *See Landgraf*, 511 U.S. at 273. Moreover, several post-*Bradley* decisions have determined that applying new statutory provisions regarding attorney fee provisions to pending civil actions does not "impose an additional or unforeseeable obligation" upon the parties. *Landgraf*, 511 U.S. at 278; *see, e.g., Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 922-23 (2nd Cir. 1992) (finding no retroactivity issue to exist where fees were awarded only for the period subsequent to passage of a new amendment); *Simmons v. Lockhart*, 931 F.2d 1226, 1229-1231 (8th Cir. 1991) (awarding fees under old scheme for work

performed before passage of new provision, and under new scheme for work performed after enactment); *Alexander S. v. Boyd*, 113 F.3d 1373, 1387-1388 (4th Cir. 1997) *cert den* 139 L. Ed. 2d 869 (1998).

The conduct affected by § 1997e(d) in the present cases is not conduct completed before the PLRA took effect. It is without question that after April 26, 1996 Respondents' attorneys had notice of the PLRA and its potential effect on any attorney fees award to which they might be entitled. Applying the PLRA fee provisions to Respondents will not "impair rights possessed when [they] acted, increase liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Limiting prisoners' attorney fees to 150 percent of the amount allowed for court-appointed counsel is not "so fundamentally unfair as to result in manifest injustice." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (instructing that section 1988 was "never intended to produce windfalls to attorneys"); see also, *Id.* at 122 (stating that section 1988 "is not a relief Act for lawyers"). Since Petitioners do not dispute Respondents' counsel's entitlement to be paid for pre-PLRA work under pre-PLRA standards, § 1997e(d) creates no new consequences for historic events, past conduct, or transactions already completed.

If the Court of Appeals' opinion is not corrected by this Court, Plaintiffs' counsel in every prison case pending in Michigan, Ohio, Kentucky and Tennessee on the date of enactment of the PLRA will essentially be "grandfathered" and entitled to the older, higher rates for as long as the case (including, as here, monitoring of the implementation of a remedial decree) might last. Such a reading is not a reasonable construction of a statute that was intended in part to lower the costs to states of prison litigation.[9]

Moreover, a lawyer's decision to represent a client and file a case cannot reasonably be based upon the assumption that

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[9] *See, e.g.*, 141 Cong. Rec. S 14312, S 14316 (daily ed. September 26, 1995) (statement of Sen. Abraham) (one goal of PLRA is to reduce litigation which "raises the cost of running prisons far beyond what is necessary").

he or she will be entitled to the same rates of compensation for the life of the case. Indeed, given that fees are only shifted if the plaintiff wins, that fee awards generally take into account changes in market rates over time, and that courts routinely apply the statutory law in effect at the time of decision to attorney fees, *Landgraf*, 511 U.S. at 264 (citing *Bradley*, 416 U.S. at 711), a lawyer's expectation is precisely the opposite. Thus, the "rights a [lawyer] possessed when he acted" are not those at the time of taking a case and filing a complaint, but rather those at the time legal work has been performed with an expectation of being paid at current rates. The "familiar considerations of fair notice, reasonable reliance, and settled expectations" confirm that application of the PLRA here is not inappropriately retroactive; lawyers who continued to perform work after passage of the PLRA can be assumed to have done so with the expectation that they would receive less compensation.

The application of the PLRA's attorney fee limitations to work performed after April 26, 1996 does not have an impermissible retroactive effect because the determination of attorney fee awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events. Moreover, the modifications made by section 803 of the PLRA to Respondents' entitlement to attorney fees are not so fundamentally unfair as to result in manifest injustice.

CONCLUSION

For all these reasons, Petitioners respectfully urge this Court to grant Certiorari and reverse the Court of Appeals.

Respectfully submitted,

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August, 1998

APPENDIX

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0117P (6th Cir.)
File Name: 98a0117p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Everett Hadix, et al. (96-2567/2568); Mary Glover, et al. (96-2586/2588; 97-1218/1272),
Plaintiffs-Appellees/ Cross-Appellants,

Nos. 96-2567/ 2568/2586/2588; 97-1218/1272

v.

Perry M. Johnson, Director, et al.,
Defendants-Appellants/ Cross-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
Nos. 77-71229; 80-73581--John Feikens, District Judge.

Argued: December 11, 1997

Decided and Filed: April 17, 1998

Before: KENNEDY, JONES, and SUHRHEINRICH, Circuit Judges.

COUNSEL

ARGUED: Leo H. Friedman, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Jeffrey D. Dillman, Ann Arbor, Michigan, for Appellees. **ON BRIEF:** Leo H. Friedman, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Michael Barnhart, Detroit, Michigan, for Appellees.

KENNEDY, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. JONES, J. (p. 29), delivered a separate concurring opinion.

OPINION

KENNEDY, Circuit Judge. These four appeals primarily concern attorney fees in the Michigan prison reform litigation which has been the subject of numerous appeals to our Court for decision. We have consolidated the appeals for decision. One of these appeals, No. 97-1218, is moot because the order challenged in that case has expired by its terms. The three other appeals present overlapping issues surrounding the propriety of three awards of attorney fees for work performed primarily during the period of January 1, 1996 through June 30, 1996.

The major issue before us is whether the attorney fee limitation of section 803(d) of the Prison Litigation Reform Act ("PLRA" or the "Act"), 42 U.S.C. § 1997e(d) applies to work performed after the PLRA's enactment date of April 26, 1996 in a case filed before the enactment date. Section 803(d), among other things, places a cap on the hourly rate attorneys may be awarded under 42 U.S.C. § 1988 in civil rights

litigation brought by prisoners. 42 U.S.C. § 1997e(d)(3). Recently, in a separate *Glover* appeal, we held that section 1997e(d) does not apply to work performed prior to the PLRA's enactment. *Glover v. Johnson*, ___ F.3d ___ (6th Cir. 1998). For reasons fully explained below, we conclude that section 1997e(d) is likewise inapplicable to post-enactment work. Neither the language of the statute nor the legislative history permits us to conclude that Congress intended to differentiate between pre-enactment and post-enactment services.

In *Glover*, defendants also argue for reversal of the fee awards because plaintiffs were not prevailing parties within the meaning of 42 U.S.C. § 1988 in three appellate matters. As explained below, we uphold the awards as to two of the three matters and reverse as to the third because the work was not compensable compliance monitoring and plaintiffs did not prevail on appeal or on their petition for certiorari. On cross-appeal, the *Glover* plaintiffs argue that the District Court abused its discretion in declining to increase the hourly rate of a paralegal from the rate last approved by the court. We shall reject this contention as without merit.

I. OVERVIEW OF THE LITIGATION

A. *Glover v. Johnson*

In 1977, a now-certified class of female inmates incarcerated in the Michigan prison system, filed an action pursuant to 42 U.S.C. § 1983 in which they alleged violations of certain constitutional rights surrounding the conditions of their confinement. The District Court found that the Glover plaintiffs had been denied the same vocational and educational opportunities provided to male inmates, in violation of the Equal Protection Clause of the Fourteenth Amendment, and that the female inmates had been unconstitutionally denied meaningful access to the courts. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) (*"Glover I"*). After extensive negotiations, the District Court entered an order specifying remedial actions to be undertaken by the defendants to remedy the constitutional violations found and retained jurisdiction until substantial compliance with the remedial order is achieved. *Glover v. Johnson*, 510 F.

Supp. 1019 (E.D. Mich. 1981) (*"Glover II"*). Neither of these orders were appealed by defendants.

On November 12, 1985, the parties stipulated to an order of the District Court, which awarded plaintiffs attorney fees, including fees for monitoring defendants' compliance with the District Court's orders, and established a system providing for plaintiffs' submission of fees and costs on a semi-annual basis and for the lodging of defendants' objections thereto. This 1985 Order, which plaintiffs contend establishes their entitlement to monitoring fees, has never been appealed. It provides in relevant part:

> IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of the fee request.

Thus, since 1985, the parties have followed this procedure and plaintiffs' attorneys have been paid attorney fees at the prevailing market rate, which has increased over the years, to the current rate of $150.00 per hour. In a Memorandum Opinion and Order dated November 27, 1989 (the "1989 Order"), the District Court interpreted its 1985 Order as authorizing attorney fees for monitoring compliance with the court's orders in this case in addition to non-monitoring legal work, and as having decided the prevailing party issue. It also held that the prevailing party issue will not be re-decided with each petition for fees, and that the court is therefore not required to await the completion of an appeal before determining whether plaintiffs are prevailing parties on otherwise compensable work. Defendants appealed the 1989 Order, and this Court affirmed the District Court's holdings. *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1989) (*"Glover III"*).

B. *Hadix v. Johnson*

In 1980, a class of male prisoners incarcerated in the State Prison of Southern Michigan, Central Complex ("SPSM-CC"), brought a class action pursuant to 42 U.S.C. § 1983 alleging violations of their rights under the First, Eighth, Ninth and Fourteenth Amendments to the Constitution. The parties

entered into a comprehensive consent decree, which was approved by and made an order of the District Court on April 4, 1985. The detailed 33-page consent decree addresses sanitation, health care, fire safety, overcrowding, volunteers, access to courts, food service, management, operations and mail at SPSM-CC and called for the submission of more detailed remedial plans to carry out a number of the consent decree mandates. Overall, the consent decree was intended to "assure the constitutionality" of the conditions of confinement at SPSM-CC. The Court retained jurisdiction to enforce the terms of the consent decree until compliance is achieved. Plaintiffs' attorneys have responsibility for monitoring defendants' compliance with the decree, which continues to this day.

On November 19, 1987, the District Court entered an order awarding fees and costs to plaintiffs' attorneys for compliance monitoring. Plaintiffs construe this order as establishing their entitlement to post-judgment monitoring fees. Under the terms of this order, defendants have the right to review and make objections to plaintiffs' fee requests. In the absence of agreement, the District Court will resolve the fee dispute.

II. PROCEEDINGS BELOW

In *Glover* and *Hadix*, each class of plaintiffs filed a fee petition for work performed from January 1, 1996 through June 30, 1996 pursuant to established procedure. Appeal Nos. 96-2586/2588 and 96-2567/2568. The *Glover* plaintiffs filed a second fee petition that covered all outstanding fees and costs related to work on two appeals. Appeal No. 97-1272. Defendants objected on several grounds to all three petitions. The District Court rejected all but one of the objections in three separate orders.

Defendants argued that the attorney fee limitation of the PLRA should be applied to the fee petitions in appeal nos. 96-2586/2588 and 96-2567/2568. In nearly identical opinions, the District Court held the fee provision inapplicable to fees earned before enactment of the PLRA but applied it to those earned thereafter.

Defendants also objected to fees for work on all appellate matters in the *Glover* fee petitions in appeal nos. 96-2586/2588 and 97-1272, which included work on three appeals, because plaintiffs had not prevailed in these matters. The first involves Case No. 94-1617, a 1996 appeal regarding defendants' obligation to provide legal assistance to plaintiffs for parental rights matters. This case has been decided against plaintiffs and the Supreme Court has denied their petition for certiorari. *Glover v. Johnson*, 75 F.3d 264 (6th Cir.) (*"Glover IV"*), *cert. denied*, 117 S. Ct. 67 (1996) (hereinafter referred to as the "parental rights appeal"). The second involves appeal nos. 95-1903/95-2037/95-2120/96-1155, consolidated appeals regarding a Compliance Committee established by the District Court (hereinafter referred to as the "Compliance Committee appeals"). These appeals were voluntarily dismissed by stipulation of the parties in March, 1996 upon dissolution of the Committee by the District Court. The third involves appeal no. 95-1521, an appeal regarding the District Court's denial of defendants' motion to terminate the District Court's supervisory jurisdiction because substantial compliance with the Remedial Plan had been achieved (hereinafter referred to as the "termination appeal"). We recently vacated this judgment, retained jurisdiction and remanded the matter to the District Court for a new determination of whether a disparity now exists between female and male inmates in educational and vocational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment and whether female inmates are presently being denied access to the courts in violation of the First Amendment. *Glover v. Johnson*, ___ F.3d ___ (6th Cir. 1998) (*"Glover V"*).

In rejecting this challenge, the District Court concluded that plaintiffs were deemed prevailing parties in the 1985 Order, that plaintiffs are not required to establish prevailing party status each time fees are sought but instead need only establish that the legal work was reasonably related to ensuring compliance with the District Court's orders. The District Court went on to conclude that the legal work at issue in all three appeals was related to monitoring compliance with the Remedial Plan and consequent court orders.

The District Court also rejected defendants' objection that the award in No. 96-2586/2588 was otherwise unreasonable as conclusory and unsubstantiated. Finally, the District Court declined to increase the rate of payment for a paralegal to the prevailing market rate because she had been approved at an established lower rate. Defendants and plaintiffs filed timely notices of appeal and cross-appeal.[1]

III. THE APPLICABILITY OF THE PLRA TO THESE ACTIONS

A. Statutory Background

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), was signed into law by President Clinton on April 26, 1996.[2] The PLRA, which comprises 10 sections, significantly affects prison litigation by amending several provisions of the United States Code.[3] The Act was intended to curtail what was perceived to be the over

1 Plaintiffs filed a motion for reconsideration of the constitutional challenges they made to the PLRA's fee provision in *Glover*, No. 96- 2586/2588, which the court denied. Plaintiffs timely appealed the denial of its motion. Because we decide that the PLRA fee provision is inapplicable to this case, we need not and do not reach plaintiffs' constitutional arguments.

2 The Act is found in Title VIII of the omnibus appropriations bill for fiscal year 1996 for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies.

3 The Act amends the following: 18 U.S.C. § 3626 (Section 802 - Appropriate Remedies For Prison Conditions); 42 U.S.C. § 1997 (Section 803 - Amendments To Civil Rights Of Institutionalized Persons Act); 11 U.S.C. § 523(a) (Section 804 - Proceedings In Forma Pauperis); 28 U.S.C. §§ 1915 (Section 804 - Proceedings In Forma Pauperis); 23 U.S.C. § 1346(b) (Section 806 - Federal Tort Claims); and 18 U.S.C. § 3624(b) (Section 809 - Earned Release Credit or Good Time Credit Revocation). The Act also adds provisions, including new sections 1915A (Section 805 - Judicial Screening) and 1932 (Section 809 - Earned Release Credit or Good Time Credit Revocation) to title 28 of the United States Code.

involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees such as those involved in *Glover* and *Hadix*.[4] The second purpose of the Act was to stem the tide of frivolous prisoner suits.[5] Today we focus on section 802, which serves the first purpose identified above by limiting judicial remedies in prison condition litigation, and section 803, which serves the second statutory purpose enumerated above by amending the Civil Rights Of Institutionalized Persons Act, 42 U.S.C. § 1997, et seq. ("CRIPA").

Section 803(d) of the PLRA includes the provision governing the award of attorney fees in prisoner civil rights litigation. 42 U.S.C. § 1997e(d). It provides in relevant part:

> **§ 1997e. Suits by prisoners**
>
> * * *
>
> **(d) Attorney's fees**
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized

4 *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) ("The legislation I am introducing today [S. 1275] will return sanity and State control to our prison systems by limiting judicial remedies in prison cases [such as those in the State of Michigan] . . . ."); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) ("These guidelines will work to restrain liberal federal judges who see violations on [sic] constitutional rights in every prisoner complaint who have used these complaints to micromanage state and local prisons.").

5 *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners).

> under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d)(1), (3). In the Eastern District of Michigan, $75 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1). The established rate of pay for plaintiffs' attorneys in both cases has been $150 per hour since at least 1993. Capping attorney fees at $112.50 (which represents 150% of the $75 maximum) would reduce plaintiffs' attorneys' hourly rate by 25%. Whether or not we apply the fee provision to the attorney fee petitions at issue in these pending cases turns on matters of statutory construction and congressional intent.

B. Judicial Construction Of PLRA Section 803(d)

1. *Landgraf v. USI Film Products, Inc.*

The analytical framework to be used when determining whether to apply a newly-enacted law to pending cases, or whether such application is impermissible because it would have retroactive effect is set forth by the Supreme Court in *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994). In step one of the *Landgraf* analysis, a court determines whether

Congress clearly defined the temporal reach of a new law. *Id.* at 257-63, 280. Where Congressional intent is clear, it is controlling. *Id.* at 264. If Congressional intent is ambiguous, a court must proceed with step two, an analysis of retroactivity.

The long-standing presumption against retroactive legislation does not arise every time a statute is applied to a pending case or when its application would upset settled expectations. *Id.* at 269 Rather, a statute operates retroactively when it "attaches new legal consequences to events completed before enactment" or "impair[s] rights a party possessed when he acted." *Id.* at 269, 280. The determination of retroactivity is made after assessing "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. Judicial inquiries should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* Retroactive legislation will not be applied in absence of manifestly clear Congressional intent. *Id.* at 280.

2. *Glover V*

In *Glover V*, *supra*, we analyzed the attorney fee limitation under *Landgraf* in the context of a petition for fees for work completed before enactment of the PLRA but awarded after enactment. Under step one, we held that Congress had not explicitly prescribed the temporal reach of the provision. Slip Op. at pp. 40-41. In so doing, we rejected the Fourth Circuit's view that the plain language of the statute providing that fees "shall not be awarded" except as provided, evinces clear congressional intent that all post-enactment fee awards, including those compensating for pre-enactment work, must comply with section 803(d). *Id.* at 41 (declining to follow *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998)). Under step two of *Landgraf*, we held that application of section 803(d) to a pending fee motion which sought compensation for work completed prior to enactment would be impermissibly retroactive because it would "attach[] significant new legal burdens to the completed work . . . [and impair] rights acquired under pre-existing law." *Id.* at 43. We thus concluded that Congress did not intend the statute to be

applied retroactively. We expressly limited our holding to work completed prior to enactment. *Id.* at 44. Now that we are squarely presented with the issue of post-enactment work in a pending case, we believe that our earlier conclusion regarding retroactivity controls the application of the very same statutory language to post-enactment fees.

Under *Landgraf*, the Court is to determine the temporal reach Congress intends a new statute to have in the absence of clear congressional intent. In *Hadix*, we determined that the attorney fee provision of section 803(d), as applied to a fee petition for pre-enactment work, would be impermissibly retroactive. From this conclusion, it followed that the historic presumption against retroactive legislation arose to bar retroactive application of the statute. The presumption is invoked to interpret new statutory language overall, and we do not believe that the resulting statutory interpretation can be limited to specific circumstances. That certain applications of the statute might be permissible does alter the statutory construction unless it can be said that Congress possessed different intentions with respect to different applications.

In this case, a court would have to find that Congress relied upon the same statutory language to convey an intent that the temporal reach of the statute is dependent upon the timing of the work, i.e., that it intended the fee provision to apply in pending cases for post-enactment fees but did not intend the provision to apply in pending cases for pre-enactment fees. We do not believe the statutory language is capable of such a sophisticated construction; either the fee provision applies in pending cases or not. Our interpretation of section 1997e(d) in *Glover V* controls our interpretation of that section here. We therefore hold that the fee limitation is inapplicable to the fee petitions before us, which include work performed both prior to and after the enactment date.

While the *Glover* court did not rely upon the recent decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), that decision supports our conclusion regarding retroactivity. As in *Lindh*, we have the negative inference that section 803(d) is inapplicable to pending cases arising from the fact that Congress made section 802 expressly applicable to pending cases but did not do the same with section 803. We believe

that under *Lindh*, the artificial distinction between pre-enactment and post-enactment work breaks down. In addition, in *Wright v. Morris*, 111 F.3d 414, 418 (6th Cir.), *cert. denied*, 118 S. Ct. 263 (1997), we held that the plain language of the exhaustion requirement of section 803(d), 42 U.S.C. § 1997e(a), evinced Congress' intent that it not be applied to pending cases. Thus, *Wright* provides additional support for concluding that Congress did not intend to apply the fee provision to pending cases because the attorney fee provision, also part of section 803(d), contains very similar temporal language to that of the exhaustion requirement.

3. *Lindh v. Murphy*

In *Lindh*, the Supreme Court was presented with the question of whether a provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which amended the federal habeas statute, applied to an application for habeas corpus pending at the time the new statute was enacted. The Court held that because one section of the AEDPA explicitly applied to pending cases and the other relevant section did not, this evinced clear congressional intent that the latter would not apply to pending cases. *Lindh v. Murphy, supra*, 117 S. Ct. at 2063. The majority opinion appears to say that when general rules of statutory construction are employed to determine a new statute's temporal reach -- the first step of the *Landgraf* analysis -- and a court determines that Congress intended purely prospective application, i.e., no application to pending cases, then the court need not apply the judicial default rules employed in the second step of the *Landgraf* analysis because there is no risk of retroactive effect. *Id.* at 2062-63 ("Although *Landgraf's* default rules would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity . . . .").

In its approach, "[t]he Court relies on one canon of statutory interpretation, *expressio unius est esclusio alterius*, to the exclusion of all others." *Id.* at 2068 (Rehnquist, J., dissenting). "The Court's opinion rests almost entirely on the negative inference that can be drawn from the fact that Congress expressly made Chapter 154, pertaining to capital

cases, applicable to pending cases, but did not make the same express provision in regards to Chapter 153." *Id.* "Chapter 153" refers to sections 2242 and 2253-2255 of Chapter 153 of Title 28 of the United States Code, which are amended by sections 101-106 of the AEDPA. "Chapter 154" was created by section 107 of the AEDPA and refers to new sections 2261-2266 of Title 28. Congress chose to make Chapter 154 explicitly applicable to pending cases. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996) ("EFFECTIVE DATE. — Chapter 154 of title 28 . . . shall apply to cases pending on or after the date of enactment of this Act.") Congress did not say anything about the effective date of Chapter 153. The Court read section 107(c), which made Chapter 154 explicitly applicable to pending cases, as "indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Lindh v. Murphy, supra*, 117 S. Ct. at 2063.

The Court distinguished procedural amendments, which it recognized would most likely be applied to pending cases. *Id.* (citing *Landgraf*, 511 U.S. at 275)[6]. The Court also suggested that had the legislative history of the two chapters been different, it might have reached a different result. *Id.* at 2064. Though the two chapters began in separate bills in separate houses, they were brought together in the same bill before section 107(c) was added. "The insertion of § 107(c)

6 In *Landgraf*, the Court considered without deciding whether attorney fee provisions are procedural or whether they affect substantive rights. *Compare Landgraf*, 511 U.S. at 277 ("[a]ttorney's fee determinations are 'collateral to the main cause of action'") (citations omitted), with *Landgraf*, 511 U.S. at 292 (Scalia, J., concurring) ("holding a person liable for attorney's fees affects a 'substantive right'"). In *Glover V*, we rejected the argument that attorney fee provisions can never result in retroactive effect because they may be procedural in nature or are collateral to the main cause of action. *Glover V, supra*, at 43. "[L]aws regulating litigation conduct [including attorney fee provisions] often impact the substantive rights of the parties as well. . . [and must be scrutinized under the Supreme Court's retroactivity analysis]. *Id.*

with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 2065 (citing *Field v. Mans*, 116 S. Ct. 437, 446 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example to contrasting statutory sections originally enacted simultaneously in relevant respects.")).

4. *Legislative History of the PLRA*

Section 802 of the PLRA contains a provision similar to that found in chapter 154 of the AEDPA making the section applicable to pending cases.[7] On the other hand, section 803 of the PLRA does not contain an effective date, just like chapter 153 of the AEDPA. The legislative history of sections 802 and 803 of the PLRA is slightly different than that of Chapters 153 and 154 of the AEDPA. The PLRA represents the culmination of efforts to reform two areas of prison litigation. First, the reformers desired to deter federal courts from so closely managing state prison systems in the context of supervising compliance with judicial decrees mandating remedies for unconstitutional prison conditions in litigation that has, in states such as Michigan, spanned decades. Second, the reformers sought to deter the "torrent" of frivolous civil rights lawsuits filed by prisoners.

Congress first proposed reform legislation in Titles II and III of the Violent Criminal Incarceration Act of 1995. H.R. 667, 104th Cong. (1995). Title II -- entitled Stop Turning Out Prisoners or STOP -- addressed the "judicial remedies" concern. "The purpose of the STOP Act is to keep our Federal courts from taking over State prisons." 141 Cong. Rec. S2648-02, S2649 (daily ed. Feb. 14, 1995) (statement of Sen.

7 Section 802(b)(1) provides that section 802(a), which amends 18 U.S.C. § 3626, "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."

Hutchison)[8]. The STOP Act is the forerunner to section 802; both limit judicial remedies in prison condition litigation by amending 18 U.S.C. § 3626. Since, like section 802, the STOP Act was directed at ongoing litigation, it was made expressly applicable to pending cases. Significantly, the STOP Act included a limitation on attorney fees, which like the rest of the STOP provisions, was applicable to pending cases. Title III of H.R. 667 amended CRIPA and addressed the "frivolous lawsuit" concern. Title III is the forerunner to PLRA section 803; both intend to deter frivolous prisoner suits by amending CRIPA. Title III's CRIPA amendments were not given an effective date and, significantly, did not contain a limitation on attorney fees.

As it made its way through the legislative process, the provision limiting attorney fees was moved from the STOP Act to the CRIPA amendments in a bill introduced by Senator Abraham of Michigan. S. 1275, 104th Cong. (1995). S. 1275 continued to expressly apply the STOP Act to pending cases and to refrain from providing an effective date for the CRIPA amendments. Thus, the attorney fee limitation was moved from a section of the statute that was expressly applicable to pending cases to a section that did not contain an effective date. None of the measures in the CRIPA amendments directed at stemming frivolous lawsuits included an effective date. See S. 1275, 104th Cong. §§ 3-4 (1995). S. 1275 contains no reference to H.R. 667 nor any explanation of why the attorney fee limitation was moved from the STOP Act to the CRIPA amendments.

Additional and extensive CRIPA amendments were proposed in S. 866, a bill focused exclusively on stemming frivolous lawsuits. S. 866, 104th Cong. (1996). The provisions of S. 866 went on to become sections 803, 804, 805, 806 and 809 of the PLRA. S. 866 did not contain the STOP Act or any limitation on attorney fees. The sponsors of S. 866 subsequently introduced S. 1279, which incorporated the STOP Act of S. 1275 and the CRIPA amendments of S. 866. The STOP Act was made expressly applicable to pending cases and the CRIPA amendments were not. S. 1279 placed

8 Senator Hutchison of Texas introduced S. 400 in the Senate, which was identical to Title II of H.R. 667.

the attorney fee-limitation in the CRIPA amendments, which is where it would remain through passage of the PLRA.

In the instant case then, "the language raising the implication" was not inserted *after* the STOP and CRIPA amendments had been joined in one bill as was the case in *Lindh*. *Lindh v. Murphy, supra*, 117 S. Ct. at 2065. We believe that any negative inference drawn from Congress' decision to move the attorney fee provision from STOP to CRIPA is weaker than the inference drawn in *Lindh*. Nonetheless, the identical negative inference that was drawn in *Lindh* can be drawn when sections 802 and 803 are compared. Furthermore, nothing in the PLRA's legislative history suggests that Congress intended section 803 to apply to pending cases. In fact, we believe that the legislative history suggests otherwise. As discussed above, the STOP Act arose to address the perceived excesses of the federal judiciary in *pending* litigation such as the instant cases and was logically made expressly applicable to pending cases. In contrast, the CRIPA amendments are forward looking as they are aimed at curtailing the *filing* of frivolous lawsuits. We have found nothing to suggest that the CRIPA amendments were aimed at pending litigation. This interpretation is also consistent with *Wright v. Morris, supra*, which held the exhaustion requirement of section 803(d) inapplicable to pending cases.

5. *Wright v. Morris*

PLRA section 803(d) governs the bringing of civil rights lawsuits by prisoners. Entitled "Suits by Prisoners", the section comprehensively amends section 7 of CRIPA, 42 U.S.C. § 1997e, which was formerly entitled "Exhaustion of Remedies." In addition to the attorney fee limitation, section 803(d) requires the exhaustion of administrative remedies before a prisoner may bring an action under section 1983. 42

U.S.C. § 1997e(a).[9] In *Wright v. Morris, supra*, this Court recently held that the plain language of the statute provides that this exhaustion requirement does not apply to pending cases.

> **§ 1997e. Suits by prisoners**
>
> **(a) Applicability of administrative remedies**
>
> *No action shall be brought* with respect to prison conditions under . . . [42 U.S.C. § 1983] by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

42 U.S.C. § 1997e(a) (emphasis supplied). Issued prior to *Lindh*, we declined to conclude that section 803 of the PLRA was inapplicable to pending cases based solely on the negative inference drawn from the fact that section 802 is expressly applicable to pending cases. *Wright*, 111 F.3d at 418. Instead, we relied upon the statutory text alone: "[T]he text of the new requirement plainly states that 'no action shall be brought' without exhaustion of administrative remedies." *Id.* We reasoned further:

> Thus, it is likely that had Congress intended the new requirement to pertain to pending cases it would have employed the same language as it used in § 802(b)(1) to make that intent clear. This strengthens our conclusion that the text of the PLRA indicates that the new administrative exhaustion requirement applies only to cases filed after the Act's passage.

Id. Even though we declined to rely solely upon the negative

9 Under section 803(d), a court may sua sponte dismiss a civil rights action filed by a prisoner, 42 U.S.C. § 1997e(c); a prisoner may not bring an action for emotional injury without a showing of physical injury, *id.* § 1997e(e); courts are instructed to conduct hearings by phone to the extent practicable, *id.* § 1997e(f); and civil rights defendants may waive their right to reply to a complaint without prejudice, *id.* § 1997e(g).

inference, we found the fact that section 802 contains a provision expressly applying it to pending cases to be significant.

Our interpretation of section 1997e(a) and reliance upon the negative inference that arises when section 803 is read together with section 802 is equally applicable when analyzing the attorney fee limitation. Section 1997e(d) admonishes that "fees shall not be awarded" in any way inconsistent with the rest of the subsection. This language is not meaningfully distinguishable from the temporal language of section 1997e(a), emphasized above, which provides that no action "shall be brought" prior to exhausting remedies and which we've interpreted as applying prospectively only.

C. Conclusion

In sum, our interpretation of section 803(d), 42 U.S.C. § 1997e(d), under *Landgraf* in *Glover V* controls our interpretation of that same section here. Because application of the attorney fee provision would have an impermissible retroactive effect in a pending case involving a petition of attorney fees for pre-enactment work, section 803(d) cannot be applied to pending cases regardless of when the underlying legal work is performed. Further, the fact that Congress chose to move the attorney fee provision from a section of the PLRA made expressly applicable to pending cases to a section without an effective date raises a negative inference under *Lindh* that Congress intended that the fee provision apply only to cases filed after enactment of the PLRA. Finally, under *Wright*, the plain language of section 803(d), 42 U.S.C. § 1997e(d), is prospective. For all of these reasons, we hold that the attorney fee provision of the PLRA is inapplicable to cases brought before the statute was enacted whether the underlying work was performed before or after the enactment date of the statute.

IV. THE PREVAILING PARTY STANDARD IN POST-JUDGMENT INSTITUTIONAL REFORM LITIGATION

We next turn to whether plaintiffs are prevailing parties in these various appeals.

A. The Law In The Sixth Circuit

1. *Glover v. Johnson (Glover III)*

In *Glover III*, this Court rejected the same "prevailing party" argument that is advanced by defendants here. We held that "plaintiffs may rely on the trial court's 1985 order to establish that they are prevailing parties and, pursuant to that order, plaintiffs have succeeded on a significant issue." *Glover III, supra*, 934 F.2d at 716. We also held that moving for contempt to compel compliance with earlier District Court orders is a compensable post-judgment monitoring activity. *Id.* at 715-16. (citing *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)). In so holding, we rejected defendants' argument that prevailing party status was dependent upon the outcome of their appeal of the District Court's contempt findings. *Id.* We also upheld the award despite reversing the District Court in part because it interpreted its remedial order beyond the order's express terms in two areas. *Id.* at 712 (vocational training), 713 (work pass program). Thus, when plaintiffs seek fees for compliance monitoring, plaintiffs are not required to again establish prevailing party status, nor is the award dependent upon the outcome of an appeal.

2. *Northcross v. Board of Education of Memphis City Schools*

Defendants rely heavily, if not exclusively, on our statement in *Northcross* in their argument that plaintiffs are not entitled to fees unless they prevail on each post-judgment dispute. There we stated, "[t]he [1977] hearings [which involved plaintiffs' work defending a desegration plan from attack] were collateral to and distinct from the desegregation suit itself, which had been finally terminated in 1974, so had

the plaintiffs failed to prevail on the merits the district court would have been justified in denying fees altogether." *Northcross*, 611 F.2d. We believe that this reliance is misplaced for several reasons. First, because the *Northcross* plaintiffs prevailed in defending the remedy and because the Court held that plaintiffs are prevailing parties, this statement is dicta. Second, defending a remedy from collateral attack is indistinguishable from affirmatively moving for contempt to enforce compliance with the remedy because both activities share the same purpose of protecting court-ordered relief. See *Jenkins v. State of Missouri*, 127 F.3d 709, 717 (8th Cir. 1997) (compliance monitoring, enforcement of the remedy, and defense of the remedy are generally viewed as "necessary adjuncts to the initial litigation" and compensable). Finally, the *Northcross* dicta relied upon by defendants is inconsistent with *Glover III*, which held that compliance monitoring is compensable regardless of the degree of success or the outcome of appeals.

Glover III does not however definitively answer how courts should handle the prevailing party issue when unsuccessful legal work for which fees are requested does not relate to compliance monitoring or otherwise protecting a remedy previously affirmed or not appealed. In such cases, we elect to follow the approach outlined recently by the Eight Circuit.

In an ongoing school desegregation case involving the Kansas City School District, the Eighth Circuit had occasion to examine the prevailing party issue when the Supreme Court struck down the use of certain remedial measures employed in the court-approved desegregation plan. *Jenkins v. State of Missouri, supra*. Because the Supreme Court's decision did not affect the district court's underlying holding that the State of Missouri had committed constitutional violations and was obligated to remedy those violations, the court found that the decision did not "retroactively take away the Jenkins class's status as a prevailing party." *Id.*, 127 F.3d at 714 (discussing *Balark v. City of Chicago*, 81 F.3d 658, 665 (7th Cir. 1996) (holding that prospective termination of a 10-year-old consent decree pursuant to Rule 60(b) -- as opposed to reversal on direct appeal -- did not deprive plaintiffs of prevailing party status, which they enjoyed for 10 years). The Eighth Circuit

treated the prevailing party question as a "threshold" issue and went on to examine "whether fees should be awarded for matters on which the plaintiff lost." *Id.* at 716.

The *Jenkins* court applied the paradigm of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a case involving a civil rights plaintiff who had prevailed on some but not all issues, to the prevailing party issue surrounding post-judgment fees in institutional reform cases. *Id.* (citing *Assoc. for Retarded Citizens v. Schafer*, 83 F.3d 1008, 1010-12, (8th Cir.), *cert. denied*, 117 S. Ct. 482 (1996)). The test asks first whether the issues in the post-judgment litigation are "inextricably intertwined with those on which the plaintiff prevailed in the underlying suit or whether they are distinct." *Id.* at 717. Compliance monitoring, enforcement of the remedy, and defense of the remedy are generally viewed as "necessary adjuncts to the initial litigation" and compensable. *Id.* Other activities, such as efforts to expand the scope of the original relief obtained, may amount to the assertion of distinct new claims that cannot rest upon the prevailing party determination in the underlying case. *Id.* When the issues are intertwined, plaintiffs are entitled to fees, i.e., they maintain their prevailing party status. *Id.* at 718. If on the other hand, the issues are distinct, plaintiffs are entitled to fees only if they prevail on the separate issue. *Id.* at 717 (discussing *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196, 202 (4th Cir. 1994) and *Schafer, supra*, which denied prevailing party status on strength of underlying litigation under these circumstances). In applying this analysis to the facts before it, the *Jenkins* court concluded that the issues that went up to the Supreme Court were related to the issues on which the Jenkins class prevailed as the plaintiffs were placed in the position of defending the scope of the district court's remedial authority. *Id.* at 719.[10]

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10 The *Jenkins* court went on to examine the reasonableness of the fee award and reduced the fee amount by 50% to reflect plaintiffs' limited success. *Id.* at 718-20. We express no opinion on this portion of the decision.

B. Application of The *Glover III/Jenkins* Standard

1. *The Compliance Committee Appeals*

In yet another *Glover* appeal, appeal no. 96-1852, defendants raised the identical prevailing party issue with respect to the same Compliance Committee fees at issue here, albeit for a different time period. In our recently-issued decision, we held that plaintiffs were prevailing parties in these appeals by virtue of defendants' voluntary dismissal and that the work was otherwise compensable as post-judgment compliance monitoring. *Glover V*, *supra*, at 46. We therefore reject this portion of defendants' challenge.

2. *The Termination Appeal*

The analysis of the termination appeal fee award is controlled by *Glover III*. Defendants do not argue that the work was unrelated to ensuring compliance with court orders or that the work was unrelated to the underlying issues on which plaintiffs prevailed. As the District Court found: "[T]he relief sought amounted to a complete termination of the Remedial Plan. Work provided by plaintiffs' counsel on this issue was critically related to monitoring compliance with the judgment."[11] Rather, defendants argue that the prevailing party issue cannot be decided without awaiting the outcome of appeal no. 95-1521. As explained above, this argument was made and rejected once before. *Glover III*, 934 F.2d at 715-16.

Additionally, we vacated the judgment denying the motion to terminate in appeal no. 95-1521, and, in lieu of assessing whether substantial compliance has been achieved, we retained jurisdiction and remanded the matter to the District Court for a new determination of whether a disparity now exists between female and male inmates in educational

11 The District Court had ruled in an earlier opinion of May 30, 1996, that a decision on fees related to work on No. 95-1521 would be stayed pending the outcome of the appeal. However, the District Court must have reconsidered the issue because it granted both fee petitions involved here, which included fees for work in No. 95-1521.

and vocational opportunities in violation of the Equal Protection clause of the Fourteenth Amendment and whether female inmates are presently being denied access to the courts in violation of the First Amendment. *Glover V*, supra, pp. 26-28. Given this outcome, we hold that plaintiffs have prevailed in appeal no. 95-1521. We further hold that this work qualifies as compensable post-judgment compliance monitoring because plaintiffs sought to protect the remedy ordered by the District Court for the equal protection violations and access to court violations it found so many years ago.

3. *The Parental Rights Appeal*

The remaining issue concerns the fees related to the parental rights appeal and petition for certiorari. This appeal originated when plaintiffs filed a motion for injunctive relief to compel compliance with the District Court's orders regarding court access. *Glover v. Johnson*, 850 F. Supp. 592 (E.D. Mich. 1994). Plaintiffs were prompted by defendants' notice of decision to reduce funding for Prison Legal Services ("PLS"), the agency which provides legal assistance to female inmates, and to wholly eliminate PLS' provision of legal assistance on parental rights matters. The District Court interpreted its earlier orders on court access as having ordered the indefinite continuation of defendants' contract with PLS, which since 1978 had required PLS to provide assistance in the area of parental rights, and held defendants in contempt of those earlier orders. *Id.* at 594. The District Court also concluded that the elimination of legal assistance in the area of parental rights would violate plaintiffs' newly-enunciated constitutional right to legal assistance in parental rights matters. *Id.* at 595-601.

The district court proceedings were broader than those on appeal. What is relevant for our purposes here is not what happened below, but instead the issues litigated on appeal. Appeal no. 96-1617 was limited to whether defendants were required by court order or by the Constitution to provide plaintiff inmates with legal assistance in parental rights matters. Plaintiffs lost on both issues. *Glover IV*, *supra*, 75 F.3d 264.

In reversing, we first held that the court had abused its discretion in holding defendants in contempt because we found no order requiring the funding of legal assistance in any particular area of law. In the absence of a violated order, the contempt finding could not be sustained. *Id.* at 267. Next, we held that defendants are not constitutionally required to provide plaintiffs legal assistance in parental rights matters. *Id.* at 269. The Supreme Court denied plaintiffs' petition for certiorari. 117 S. Ct. 67 (1996).

In awarding fees for appellate work on this matter, the District Court acknowledged this Court's conclusion that defendants had provided legal services for parental rights matters without the support of a direct order but nevertheless concluded that the "work done by plaintiff contesting the termination of services was a post-judgment monitoring activity and is therefore compensable." We disagree with this conclusion. Given the lack of any remedial order, plaintiffs' counsel's efforts might best be characterized as a failed offensive attempt to expand the remedy. In such circumstances courts are less inclined to award fees. *See, e.g., Ustrak v. Fairman,* 851 F.2d 983, 990 (7th Cir. 1988). Plaintiffs' attorneys' efforts do not qualify as post-judgment compliance monitoring and plaintiffs cannot rely upon their status as prevailing parties in the underlying litigation. We therefore reverse this portion of the challenged awards given plaintiffs' lack of success in appeal no. 96-1617 and in the petition for certiorari to the Supreme Court.

C. Conclusion

Defendants' challenges to the award of fees for work on the Compliance Committee appeals and on the termination appeal are rejected because the work is compensable compliance monitoring and because plaintiffs prevailed. Defendants' challenge to the award of fees for the unsuccessful work on the parental rights appeal and petition for certiorari is sustained because this claim went beyond the underlying litigation and plaintiffs did not prevail.

V. OTHER ISSUES ARISING IN *GLOVER*

A. The District Court's Denial of Defendants' Objections To The Award As Unreasonable Was Not Clearly Erroneous

Defendants objected to 47.4 hours in plaintiffs' fee petition as "frivolous" and "unnecessary"; 48.7 hours as "excessive" and "inappropriate"; and 18.9 hours as "non-Glover" related. The District Court found that "defendants' broad objections and conclusory allegations" were an insufficient basis for denying these fees.

On appeal, defendants make absolutely no effort to add specificity to their objections or to otherwise substantiate their claims. Defendants argue that plaintiffs have filed "unnecessary" and "frivolous" pleadings *without identifying those pleadings* for this Court or explaining why any such pleadings were unnecessary or frivolous. Defendants' argument that certain fees were "non-Glover related" is just a rehashing of their "prevailing party" argument, which we have rejected on numerous occasions. The District Court was not clearly erroneous in rejecting defendants' objections as an insufficient basis to deny fees which have been carefully documented by plaintiffs' counsel.

B. Whether the District Court Erred in Refusing to Approve An Award of Fees For Paralegals At The Prevailing Market Rate

Despite finding that $80 was well within the prevailing market rate for paralegals, the District Court refused to approve that rate because the rate established for paralegals in its order 1990 was $45 per hour. We conclude that the District Court did not abuse its discretion in so refusing. Plaintiffs could have submitted a petition for a higher rate before or while the services were being rendered if a higher rate was necessary.

C. Appeal No. 97-1218

The last appeal, No. 97-1218, involves a challenge to the District Court's order of January 31, 1997 enjoining

defendants from eliminating funding for provision of legal services to women prisoners at current levels. The order terminated by its own terms upon a decision in appeal No. 96-1931, which was pending at the time of the court's ruling. Thus, the issues raised in appeal no. 97-1218 became moot upon entry of our opinion in *Glover V*, *supra*, which decided, among others, appeal no. 96-1931.

VI. CONCLUSION

We dismiss appeal no. 97-1218 as moot. In appeal nos. 96- 2567/2568, 96-2586/2588 and 97-1272, we affirm in part, reverse in part and remand the cases to the District Court for a recalculation of the fee awards in a manner consistent with this opinion.

CONCURRENCE

NATHANIEL R. JONES, Circuit Judge, concurring. I generally concur in the majority's well drafted opinion. However, I write separately to express my disagreement with the majority's reversal of the district court's award of attorney's fees for work in the parental rights appeal, No. 96-1617, and the subsequent petition for certiorari to the Supreme Court. Although the plaintiffs were not ultimately successful in the appeal, I feel that this work, along with all of the other work plaintiffs' counsel performed in this case, was compensable post-judgment compliance monitoring and related to the underlying equal protection and access to court claims upon which plaintiffs prevailed in their original action. I would therefore affirm all of the fee awards in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al,

Plaintiffs, Case No. 80-73581

vs. Hon. John Feikens

PERRY JOHNSON, et al,

Defendants.
_____/

OPINION AND ORDER

I. BACKGROUND

Plaintiffs' counsel in this case request fees for work performed between January 1, 1996 and June 30, 1996 pursuant to established billing procedures in this case. Defendants contend that hours billed for work performed after April 26, 1996, the enactment date of the Prison Litigation Reform Act, Pub.L.No. 104-134, 1996 ("the Act' or "PLRA"), are subject to its limitation on fees.

Amending 42 U.S.C. §1997e, the provision of the PLRA at issue stipulates:

> No award of attorney's fees in an action (brought by a prisoner in which attorney fees are authorized] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

§803(d)(7)(d)(3)- The hourly rate for court-appointed attorneys is $60 per hour unless the Judicial Conference of the United States determines that a higher rate not in excess of $75 per hour is justified for a particular circuit. 18 U.S.C.

§3006A(d)(1). The rate of pay for plaintiffs' counsel in this case has been established at $150 per hour. Under the PLRA, their rate would be reduced to $112.50 per hour (150% of the $75 maximum hourly rate for time expended in the Eastern District of Michigan).

The PLRA was enacted eleven years after a consent judgment was entered in this case. The issue before me is whether the PLRA's limitation on attorney fees applies to work done on this case after the effective date of the Act.

For reasons set forth below, I conclude that the PLRA-mandated cap on attorney fees applies to this case for work performed after April 26, 1996. As to the only other source of contention, 2') hours' work provided by plaintiffs' counsel in preparation of a brief regarding the constitutionality of the PLRA, I find that the length of time involved was not excessive.

II. APPLICATION OF THE PLRA TO ATTORNEYS' FEES

In *Landgraf v. USI Film Products*, 511 U.S. __, 114 S.Ct. 1483, 128 L.Ed.2d 299 (1994), the Supreme Court clarified how to resolve the conflict between the presumption that a statute should not be applied retroactively and the presumption that a court "should apply the law in effect at the time it renders its decision.'" *Bradley v. Richmond School Board*, 416 U.S. 69 , 711 (1974).

When a statute affects events which transpired in the suit before its enactment, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf*, 114 S.Ct. at 1505.

' In an opinion and order dated May 30, 1996, 1 held that the PLRA's provisions on attorney fees do not apply to work performed before its enactment.

The PLRA is comprised of ten sections, only one of which (§802) specifies that it is to be applied to pending cases. The provisions that limit attorney fees are found in §803 of the Act, which, plaintiffs contend, signals the congressional intent for prospective application. As further evidence, plaintiffs point out that attorney fees provisions were originally included in §802 of the Act, but were removed from that section in the final version of the bill. Application of the PLRA to this case, they argue, would specifically read into the statute the very fee limitation Congress eliminated.

The negative inference plaintiffs urge me to draw is too attenuated to support a finding of congressional intent. In *Hutto v. Finney*, 437 U.S. 678 (1977), a prison conditions case in which attorney fees were granted against a state government, the Court referred to express indications of congressional intent in the legislative history to uphold the award of fees. *Id.* at 694. But in *Landgraf* the Court tempered its reliance on statements made in the Congressional Record in observing that conflicting opinions more closely reveal partisan statements than congressional intent. *Landgraf*, 114 S. Ct. at 1495. Here there are no statements at all concerning the issue of retroactivity; there are only conflicting placements of a provision in a bill as it made its way through Congress. This fact is insufficient to evince congressional intent

Absent legislative guidance, my next inquiry is whether application of the statute would have a retroactive effect. If so, it will not be applied to this case. To determine whether a statute operates retroactively,

> the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S.Ct. at 1499. Factors to be considered to determine a statute's retroactive effect are whether it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*, 114 S.Ct. at 1505.

Plaintiffs' counsel have been entitled to fees in this case, and a specific system of payment and rate of pay has been established. Changing the rate from $150 to $112.50 per hour, according to plaintiffs, is a drastic reduction over market rates, particularly in light of the spiraling litigiousness of this case in the last two years. They contend that application of §803(d) would fail to protect their "reasonable reliance" and "settled expectations'" in having their counsel paid comparably to the prevailing market rate and that such a change would occur without providing them "ample notice" since this case was filed so long before the introduction of the PLRA.

It is true that "settled expectations should not be lightly disrupted." *Id.*, 114 S. Ct. at 1483. As explained by the Court in *Landgraf*, a free and changing society needs to be protected from the danger of arbitrary or vindictive power exercised over past conduct. *Id.* at 1497-98. This principle was encapsulated in the Supreme Court's admonition that a law should not be applied retroactively if doing so "would result in manifest injustice." *Bradley*, at 711.

I conclude that this Act would not impair plaintiffs' or their counsel's rights to the extent that its application would be impermissibly retroactive. I am guided by the Supreme Court's observation that application of a statute which "authorizes or affects the propriety of prospective relief" is not retroactive, *Landgraf*, 114 S.Ct. at 1501, the rationale being that "'relief by injunction operates *in futuro*' and that plaintiff has no 'vested right' in the decree entered by the trial court." *Id., citing American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

The rate of pay in this case has been adjusted in keeping with the prevailing market rate. Considering the fact that court-appointed counsel in this district are paid the maximum amount allowed by statute, and the fact that the PLRA's cap

is 150% of that amount, I cannot say that Congress's intent to limit plaintiffs' counsel to $112.50 per hour is so fundamentally unfair as to result in manifest injustice. Nor can I say that this legislation unreasonably disrupts settled expectations. "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." 114 S.Ct. at 1499, n.24, *quoting* L. Fuller, The Morality of Law. 51-62 (1964).

III. 23 HOURS IN DISPUTE ON THE PLRA BRIEF

Defendants object to 23 hours of attorney fees (17.2 hours for Patricia Streeter and 5.8 hours for Michael Barnhart) accumulated in preparing a brief in response to defendants' motion to terminate the consent decree in this case pursuant to the PLRA. It has been acknowledged by both parties that the brief is based on a memorandum of law prepared by the Legal Aid Society - Prisoner Rights Project and submitted in *Benjamin v. Jacobsen*, United States District Court (S.D.N.Y.) No. 75-Civ-3073. Claiming that only seven original sentences were added by plaintiffs' counsel, defendants object to the 23 hours spent as unreasonable.

The brief submitted to this court was 83 pages long, presented three distinct constitutional arguments, and included a detailed factual affidavit explaining facts from the 16-year history of this case. I note that without the memorandum at their disposal plaintiffs' counsel would have been required to spend far greater than 23 hours to prepare an adequate response. Considering the magnitude and complexity of this issue, I believe that 23 hours of preparation time is well within the realm of reason.

IV. CONCLUSION

IT IS ORDERED that the PLRA's limits on attorney fees apply to this case for work performed after the PLRA's enactment on April 26, 1996.

IT IS FURTHER ORDERED that plaintiffs re-submit fee requests for work performed between January 1, 1996 and June 30, 1996 in which counsel's fees are limited to $112.50 per

hour for time worked after April 26, 1996.

IT IS FURTHER ORDERED that upon receiving this revised request defendants pay plaintiffs' counsel for the contested 23 hours' work provided.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Dec. 4, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al*,

Plaintiffs, **Case No. 77-71229**

vs. **Hon. John Feikens**

PERRY JOHNSON, *et al*,

Defendants.

OPINION AND ORDER

I. BACKGROUND

Plaintiffs' counsel in this case request fees for work performed between January 1, 1996 and June 30, 1996 pursuant to established billing procedures in this case. Defendants contend that hours billed for work performed after April 26, 1996, the enactment date of the Prison Litigation Reform Act, Pub.L.No. 104-134, 1996 ("the Act' or "PLRA"), are subject to its limitation on fees.

Amending 42 U.S.C. §1997e, the provision of the PLRA at issue stipulates:

> No award of attorney's fees in an action (brought by a prisoner in which attorney fees are authorized] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

§803(d)(7)(d)(3)- The hourly rate for court-appointed attorneys is $60 per hour unless the Judicial Conference of the United States determines that a higher rate not in excess of $75 per hour is justified for a particular circuit. 18 U.S.C.

§3006A(d)(1). The rate of pay for plaintiffs' counsel in this case has been established at $150 per hour. Under the PLRA, their rate would be reduced to $112.50 per hour (150% of the $75 maximum hourly rate for time expended in the Eastern District of Michigan).

The PLRA was enacted 19 years after this case was filed. . The issue before me is whether the PLRA's limitation on attorney fees applies to work done on this case after the effective date of the Act.[1] Also before me is a host of objections to work performed by plaintiffs' counsel.

For reasons set forth below, I conclude that the PLRA-mandated cap on attorney fees applies to this case for work performed after April 26, 1996. I also find that defendants' objections to plaintiffs' fee requests are without merit, with the exception of defendants' objection to plaintiffs' requested rate of payment for the work provided by Gale Greiger.

II. APPLICATION OF THE PLRA TO ATTORNEYS' FEES

In *Landgraf v. USI Film Products*, 511 U.S. __, 114 S.Ct. 1483, 128 L.Ed.2d 299 (1994), the Supreme Court clarified how to resolve the conflict between the presumption that a statute should not be applied retroactively and the presumption that a court "should apply the law in effect at the time it renders its decision.'" *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974).

When a statute affects events which transpired in the suit before its enactment, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf*, 114 S.Ct. at 1505.

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[1] In an opinion and order dated May 30, 1996, I held that the PLRA's provisions on attorney fees do not apply to work performed before its enactment.

The PLRA is comprised of ten sections, only one of which (§802) specifies that it is to be applied to pending cases. The provisions that limit attorney fees are found in §803 of the Act, which, plaintiffs contend, signals the congressional intent for prospective application. As further evidence, plaintiffs point out that attorney fees provisions were originally included in §802 of the Act, but were removed from that section in the final version of the bill. Application of the PLRA to this case, they argue, would specifically read into the statute the very fee limitation Congress eliminated.

The negative inference plaintiffs urge me to draw is too attenuated to support a finding of congressional intent. In *Hutto v. Finney*, 437 U.S. 678 (1977), a prison conditions case in which attorney fees were granted against a state government, the Court referred to express indications of congressional intent in the legislative history to uphold the award of fees. *Id.* at 694. But in *Landgraf* the Court tempered its reliance on statements made in the Congressional Record in observing that conflicting opinions more closely reveal partisan statements than congressional intent. *Landgraf*, 114 S. Ct. at 1495. Here there are no statements at all concerning the issue of retroactivity; there are only conflicting placements of a provision in a bill as it made its way through Congress. This fact is insufficient to evince congressional intent.

Absent legislative guidance, my next inquiry is whether application of the statute would have a retroactive effect. If so, it will not be applied to this case. To determine whether a statute operates retroactively,

> the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S.Ct. at 1499. Factors to be considered to determine a statute's retroactive effect are whether it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*, 114 S.Ct. at 1505.

Plaintiffs' counsel have been entitled to fees in this case, and a specific system of payment and rate of pay has been established. Changing the rate from $150 to $112.50 per hour, according to plaintiffs, is a drastic reduction over market rates, particularly in light of the spiraling litigiousness of this case in the last two years. They contend that application of §803(d) would fail to protect their "reasonable reliance" and "settled expectations'" in having their counsel paid comparably to the prevailing market rate and that such a change would occur without providing them "ample notice" since this case was filed so long before the introduction of the PLRA.

It is true that "settled expectations should not be lightly disrupted." *Id.*, 114 S. Ct. at 1483. As explained by the Court in *Landgraf*, a free and changing society needs to be protected from the danger of arbitrary or vindictive power exercised over past conduct. *Id.* at 1497-98. This principle was encapsulated in the Supreme Court's admonition that a law should not be applied retroactively if doing so "would result in manifest injustice." *Bradley*, at 711.

I conclude that this Act would not impair plaintiffs' or their counsel's rights to the extent that its application would be impermissibly retroactive. I am guided by the Supreme Court's observation that application of a statute which "authorizes or affects the propriety of prospective relief" is not retroactive, *Landgraf*, 114 S.Ct. at 1501, the rationale being that "'relief by injunction operates *in futuro*' and that plaintiff has no 'vested right' in the decree entered by the trial court." *Id., citing American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

The rate of pay in this case has been adjusted in keeping with the prevailing market rate. Considering the fact that court-appointed counsel in this district are paid the maximum amount allowed by statute, and the fact that the PLRA's cap

is 150% of that amount, I cannot say that Congress's intent to limit plaintiffs' counsel to $112.50 per hour is so fundamentally unfair as to result in manifest injustice. Nor can I say that this legislation unreasonably disrupts settled expectations. "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." 114 S.Ct. at 1499, n.24, *quoting* L. Fuller, The Morality of Law. 51-62 (1964).

III. DEFENDANTS' OBJECTIONS TO SPECIFIC FEES

A. Prevailing Party Issue

Defendants object to all work performed by plaintiffs' counsel involving matters within the jurisdiction of the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court. This includes work on three appeals to the court of appeals by defendants and one petition of *certiorari* to the Supreme Court by plaintiffs. They also object to all work done in relation to my establishment of a Compliance Committee since that committee was ultimately dissolved and orders relating to it were vacated by my order dated January 5, 1996. The gist of defendants' argument is plaintiffs can not show that they are the prevailing party on these appeals and, therefore, are not entitled to reimbursement but instead are subject to a set-off for any fees previously paid.

I have previously held that plaintiffs are not required to be the prevailing party to be entitled to fees, and the law of the case doctrine precludes this issue from being relitigated. *Arizona v. California*, 460 U.S. 605, 618 (1983). In 1985 I ordered that plaintiffs are entitled to attorney fees and have since ruled that this order does not require plaintiffs to be the prevailing party to collect the award.[2] This position was subsequently upheld by the United States Court of Appeals for the Sixth Circuit. *Glover v. Johnson*, 934 F.2d 703, 715-16 (1991). In that decision, the court upheld the award of attorney fees because plaintiffs were seeking compliance with previous orders of this court.

In 1994 I ruled that defendants were in contempt of prior orders in this case when they unilaterally terminated legal services in child custody matters. Reversing my decision, the United States Court of Appeals for the Sixth Circuit concluded that no specific order was violated. The Supreme Court denied plaintiffs' petition for *certiorari*. Plaintiffs now request fees for time worked on those appeals.

Although it is has been decided that funding for legal services for custody matters was provided by defendants without the support of a direct order, I conclude that work done by plaintiff contesting the termination of services was a post-judgment monitoring activity and is therefore compensable. Detailed findings of fact have been made demonstrating that child custody services were a well-established practice in this case:

> On January 6, 1992, defendants entered into a one-year contract with [Prison Legal Services] to provide assistance in various areas including child custody, child visitation and parental neglect. This contract, and the services provided thereunder, was specifically entered into for the purpose of complying with this court's previous orders. Its *Statement of Purpose* is significant:
>
> > Whereas the STATE desires to establish a system that will provide indigent female offenders currently incarcerated at the ... Facility with selected legal services **as ordered by the court** in *Glover v. Johnson*.

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[2] See, for example, my memorandum opinion dated November 27, 1989 resolving defendants' objections to plaintiffs' attorney fees for the time period of 1987 through 1989.

Glover v. Johnson, 850 F.Supp. 592, 594 (E.D. Mich. 1994). The contract went on to specify that the areas of law in which services are provided: "Domestic relations including divorce, child custody, visitation disputes, and child neglect actions." *Id*. For years, lawyers for Prison Legal Services provided those services to inmates. *Id*. It was therefore not only reasonable but necessary to ensure compliance with established practices in this litigation for plaintiffs' counsel to contest defendants' termination of funding. The decisions by Sixth Circuit Court of Appeals and the Supreme Court would render unreasonable subsequent work performed on this issue, but those decisions do not detract from the fact that plaintiffs were seeking compliance before this issue was decided with finality. Their request for fees is appropriate.

Plaintiffs are therefore similarly entitled to fees on those matters on appeal and on those matters concerning the Compliance Committee.

B. <u>The Hourly Rate for Gale Greiger</u>

The rate established in this case in 1990 for paralegals was $45 per hour. Gale Grieger, a lawyer with four years' experience, was approved by me as a paralegal. Plaintiffs now request a rate of $80 per hour for work done by her. Defendants argue that all past increases in rates have occurred prior to the time of billing and that plaintiffs therefore should have requested the increased hourly rate for Grieger upon her appointment.

Plaintiffs cite the Michigan Bar Journal's 1994 Economic Survey which listed the rates for legal assistants with five years' experience at $75 per hour and the rates for associates with three years' experience at $85 to $135 per hour. They also refer to an affidavit indicating that the prevailing market rate for a paralegal in Ann Arbor was $60 to $65 per hour in 1990.

Plaintiffs may be correct in their contention that Grieger's education and experience make her rate of $80 per hour well within the prevailing mark-et rate; however, that is not the rate for which she was approved to work in this case, and no basis now exists for a retroactive increase in her hourly rate. I

therefore find that defendants are required to pay the established $45 per hour for her work.

C. **The Hourly Rate for Jeffrey Tillman**

Attorney Jeffrey Tillman's hourly rate was established at $110 per hour before the PLRA was enacted. Since the PLRA reduced the lead counsel's rate from $150 to $112.50 per hour, defendants argue that the proportional difference between counsel should continue to be recognized and Tillman's rate should thus be reduced to $82.50 per hour.

This theory is without support from the text and legislative history of the PLRA. The Act does not require all attorneys to be limited to a portion of the fair market rate for their services. It establishes a cap, and this attorney's fees are below that cap. The corresponding change in proportion between Tillman's rate and lead counsel's rate does not make his rate inappropriate.

D. **All Other Hours In Dispute**

Defendants object to a total of 47.4 hours as "frivolous" and 'unnecessary," to 48.7 hours as "excessive" and 'inappropriate,' and to 18.9 hours as non-*Glover* related. Plaintiffs counter that all of the work performed was reasonably related to monitoring defendants' compliance and that much of their work has been brought about by defendants' strategy in the last two years of contesting every motion, appealing every court order, and challenging every fee petition.

The standard for determining whether specific hours are compensable in the post-judgment monitoring setting are whether those hours were reasonably related to monitoring and ensuring compliance with the district court's orders. *Northcross v. Board of Ed. of Memphis City Schools*. 611 F.2d 624 (1979), *cert. den*. 447 U.S. 911 (1980). I find defendants' broad objections and conclusory allegations insufficient as a basis for denying these fees. Plaintiffs' counsel have specifically recorded their work and the costs they have incurred. They have also made a showing of a substantial amount of work completed in association with this case but

not billed to defendants. I see no basis for defendants' objections.

IV. CONCLUSION

IT IS ORDERED that the PLRA's limits on attorney fees apply to this case for work performed after the PLRA's enactment on April 26, 1996.

IT IS FURTHER ORDERED that plaintiffs re-submit fee requests for work performed between January 1, 1996 and June 30, 1996 in which counsel's fees are limited to $112.50 per hour for time worked after April 26, 1996 and Gale Grieger's fees are limited to $45 per hour.

IT IS FURTHER ORDERED that defendants, after receiving this revised request, compensate plaintiffs' counsel for all other fees contested in this motion.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Dec. 4, 1996

96-2567/2568/2586/2588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EVERETT HADIX, ET AL. (96/2567/2568); MARY GLOVER, ET AL. (96/2586/2588),	)	
Plaintiffs-Appellees/ Cross-Appellants,	)	
v.	)	ORDER
PERRY M. JOHNSON, DIRECTOR, ET AL.,	)	
Defendants-Appellants/ Cross-Appellees.	)	

BEFORE: KENNEDY, JONES, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Filed June 18, 1998